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IN THE

Supreme Court of the United States

October Term, 1967

No. 1143

CARLE & MONTANARI, INC.,
Petitioner,

against

JOHN W. McGRATH CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

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The brief of respondent, McGrath (in which the American Export Line * has joined), avoids a discussion of the paramount question presented in the petition, *viz.*, whether the decisions of the lower courts giving the stevedore the

* Counsel for the carrier, American Export Isbrandtsen Lines, Inc., in a footnote (respondents' brief, p. 1), expresses lack of knowledge why the caption of the petition lists only stevedore, John W. McGrath, as a respondent.

The judgment of $500 awarded petitioner by the District Court was solely against the stevedore. No issue as to the liability of the carrier was presented in the Court of Appeals, which was stipulated to be $500 (R. 30), and petitioner's motion for summary judgment was directed against only the stevedore (R. 33).

The reason assigned by the carrier for the filing of a brief in the Court of Appeals was "its indirect but vital interest in the case". Therefore, its appellate court brief was that of an *amicus curiae*, although it failed to obtain leave to file same, as is required under Rule 19(b) of that Court. Similarly, in this Court, the carrier has not made application for leave to file as is provided in paragraph 1 of Rule 42.

benefit of the $500 limited liability is in direct conflict with the rule of strict interpretation prescribed for a negligent stevedore in *Herd & Co.* v. *Krawill Machinery Corp.* (1959), 359 U.S. 297—this Court's most recent decision upon the issue. The respect in which the lower courts disregarded the views of this Court in the *Herd* case is discussed at pages 4-8 of the petition.

In the *Herd* case, *supra,* this Court stated the rule as follows:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed * * * for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.'"

As is stated in the petition (pp. 7-8), the District Court, despite the stevedore's admitted negligence, and the absence of any provision in the bill of lading absolving the stevedore from damage due to its negligence, erroneously held the $500 limitation provision to be a "contract which fixes the value of the goods * * * [and] is not a contract exonerating a negligent party from liability", and, therefore, is not required to be strictly construed.

As appears on pages 6 and 7 of the petition, the language of both Section 4(5) of COGSA (46 U.S. Code, Sec. 1304(5) and clause 17 of the bill of lading (R. 42), relating to the carrier's $500 liability, contains words of limitation. Similar language was held by this Court to be a "limitation agreement" in *Ansaldo San Giorgio I.* v. *Rheinstrom Bros. Co.* (1935), 294 U.S. 494, 497. The same construction was given Section 4(5) of COGSA by this Court in the *Herd* case, *supra,* and by the Court of Appeals below in *Stirnimann* v. *San Diego,* 148 F.(2d) 141, 143 (2 Cir., 1945), and *Pan-Am Trade & Credit Corp.* v. *The Campfire,* 156 F.(2d) 603, 605-606 (2 Cir., 1946); cert. den. 329 U.S. 774.

In lieu of replying to the issue presented in the petition, respondent's brief advances the following two irrelevant matters:

(1) that Section 4(5) of COGSA and clause 17 of the bill of lading are "agreed valuations" and not provisions limiting the stevedore's liability; and

(2) respondent seeks to equate decisions governing a common carrier's liability for negligence, where the bill of lading provides for calculation of damages based upon alternative freight rates (*Kansas City Southern Railway Co.* v. *Carl* (1913) 227 US 639, 650, and *Hart* v. *Pennsylvania Railroad,* (1884), 112 US 331, 343, cited at page 5 of respondent's brief), with contractual provisions governing a tort-feasor's liability which offer no choice of rates for alternative liability.

Disregarding the decisions in the *Herd, Stirnimann* and *Campfire* cases, *supra,* respondent, in reliance upon the District Court's erroneous construction that Section 4(5) of COGSA and clause 17 of the bill of lading (R. 42) are not contracts "exonerating a negligent party from liability" (R. 54), asks this Court to deny petitioner's application for a writ, upon the fallacious contention that the aforementioned $500 limitation clauses are "valuations" (respondent's brief, p. 7).

The second untenable position advanced by respondent (brief, pp. 4-6), is that the decisions of this Court in *Hart* v. *Pennsylvania Railroad, supra,* and *Kansas City Southern Railway Co.* v. *Carl, supra,* are pertinent to the issue of the extent of the stevedore's liability herein because the carriers' bill of lading limitation of liability provisions in those cases, were held to be valid, despite the circumstance that "the claims made therein were bottomed on negligence" (brief, p. 5).

It is true that, in respect of common carriers, courts have declared that it is not against public policy for such carriers to limit their liability where they offer alternative

freight rates. However, the liability of stevedores and other agents of carriers are governed by the law of torts and they are liable, without limitation, for damage resulting from negligence, unless the contract explicitly specifies that the limitation shall apply *despite such negligence.*

Herd & Co. v. *Krawill Machinery Corp.* (1959), 359 U.S. 297, 304-305;
Van Dyke Prods. v. *Eastman Kodak Co.*, 12 N.Y. 2d 301, 304-305 (1963);
Boll v. *Sharp & Dohme*, 281 App. Div. 568, 570 (1953).

Conclusion

Because of the aforementioned errors of the District Court, approved by the Court of Appeals, in disregarding this Court's ruling in the *Herd* case, *supra,* it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. Herbert Prem,
Counsel for Petitioner.